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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE, Plaintiff and Respondent, v. ANTONIO GARCIA-SANCHEZ, Defendant and Appellant.	C058001 (Super. Ct. No. SF097011B)

A jury convicted defendant Antonio Garcia-Sanchez of three counts of attempted murder and one count of street terrorism, and found several enhancement allegations true, including that the attempted murders were committed for the benefit of a criminal street gang and that defendant (gang principal) personally and intentionally discharged a firearm resulting in great bodily injury. (Pen. Code, §§ 664/187, 186.22, subds. (a), (b)(1), 12022.53, subds. (c), (d), (e)(1).)[1] The jury acquitted defendant of three alternative counts of assault with a firearm. (§ 245, subd. (a)(2).) The jury was instructed to

[1] Undesignated statutory references are to the Penal Code.

so acquit should it convict defendant of the three attempted murders.

Sentenced to a state prison term of nearly 97 years to life (based largely on the firearm enhancements), defendant appeals. He contends that the prosecutor engaged in misconduct at trial and also withheld evidence implicating Juan Rayo in the shooting, and that the trial court erroneously denied defendant's motion for new trial based on newly discovered evidence that Rayo committed the shooting. Defendant also contends the cumulative effect of the errors denied him due process.

We shall affirm the judgment.

FACTUAL BACKGROUND

The shooting capped off an initial fistfight between Norteno and Sureno gang members that took place near dusk at the San Joaquin County Fair on June 26, 2005.

In a videotaped police interview that was played for the jury, defendant admitted that he was a member of a Sureno subset; that he went to the fair that night with a group of Surenos, wearing colors, knowing that a fight with the Nortenos was "[m]andatory"; that he did engage in such a fight; and that the fight ended when fellow Sureno Juan Rayo unloaded three or four bullets in the direction of the Nortenos from a .22-caliber revolver. During this interview, defendant denied the officer's accusation that he (defendant) had given the gun to Rayo around

the time of the fight, but the following exchange between the officer and defendant subsequently occurred during the interview:

"[Officer]: Okay, so you guys, so you guys, you guys go into the fair, you guys are walking around. You make it to the back side, and you guys are, you guys are hit up by, by Nortenos. [¶] Words are exchanged. Okay, you guys get into a fight. You slide the gun to [Rayo], and [Rayo] does the shooting right? He's the one that shot. That's how it happened?

"[Defendant]: Yeah."

Three people were shot: Jose P., S.C., and D.C. The shooting immediately followed the fisticuffs when some of the Nortenos began chasing the Surenos. Two of the Surenos stopped in the midst of the chase: One of them began firing while the other ran off.

Jose P. never saw who shot him.

Those who provided testimony regarding the shooter's identity were S.C., D.C., D.C.'s cousin (Hector C.), a fair worker (Bob D., through an officer's statement), a fairgoer (Jordan G.), and Officer Kelly Drake.

These witnesses described the shooter's clothing generally in line with what Rayo had been wearing on the night of the shooting, as confirmed by Officer Drake who stopped a perspiring, heavy-breathing, and apparently nervous Rayo just

outside the fair gates pursuant to a dispatch description of the shooter's clothing (the most prominent item of attire was a blue checkered shirt). However, these witnesses also described the shooter's build and height as generally in line with defendant's 5 feet 10 inches, 150-pound frame rather than with Rayo's significantly shorter 5 feet 2 inches, 120-pound carriage. Rayo also had a distinctive goatee, but no such facial hair was described by the witnesses. An in-field showup of Rayo as the shooting suspect proved negative as well. And defendant inconsistently described what he had been wearing on the night of the shooting--apparently, some sort of blue and white jersey with the number 81 or 31.

Detective Jim Ridenour prepared two photo lineups, one of defendant and the other of Rayo. None of the three shooting victims--Jose P., S.C., D.C.--was able to identify either of them.

However, D.C.'s cousin, Hector C., identified defendant from the photo lineup as "the guy who shot into the crowd" (in the words of Detective Ridenour). Hector identified Rayo from the other lineup as the Sureno who had also stopped just before the shots were fired and then took off running. At the time of the shooting, Hector and D.C. had been standing in line for a ride. Hector's testimony was "solid" as to defendant's identification as the shooter (again, as characterized by Detective Ridenour), but was equivocal and inconsistent as to whether Rayo had handed the gun to defendant. Hector

acknowledged participating with others in striking two victims and taking their property in November 2005, for which he was on juvenile probation at the time of defendant's trial.

Detective Ridenour first became aware of defendant as a possible suspect in early July 2005, and obtained search and arrest warrants on July 28. Defendant, however, left Stockton around July 20, 2005, and headed to Indio, where, he said, he had two sisters and a good job opportunity. Ridenour traced defendant to Indio, and conducted a videotape interview of him there on February 23, 2006 (which was played for the jury). During this interview, Ridenour initially asked defendant if he knew why Ridenour was there. Without anything having been said about the charges, defendant replied that it was "something about attempted murder."

Defendant testified at trial. He admitted being at the fair on the night of the shooting, but denied having anything to do with a gun that night. He claimed the shooter was Rayo. Contrary to the prosecution's theory that he had received a phone call "to do battle" at the fair against the Nortenos, defendant stated he got a phone call from a friend, Erika C., while en route to the fair with his fiancée and daughter. Erika asked for a ride to the fair for herself and some friends. Defendant dropped his fiancée and daughter off at the fair and then picked up Erika and her entourage and returned to the fair.

Defendant conceded that he did not mention anything about giving Erika C. a ride to the fair in his statement to Detective

Ridenour. He also acknowledged that while living in Indio in January 2006, he was stopped by the Indio police and gave the false name of Orlando Navarro. Finally, Detective Ridenour identified various scratches on the wall of the courthouse holding cell where both defendant and Hector C. had spent time on different occasions during the trial. These scratches comprised defendant's gang identification and moniker.

DISCUSSION

I. Prosecutorial Misconduct

Defendant contends the prosecutor engaged in misconduct when she cross-examined him with inaccuracies regarding a prior juvenile adjudication. We conclude that any misconduct was cured by the trial court's admonition.

"Conduct by a prosecutor can so infect the trial with unfairness as to make the resulting conviction a denial of due process. [Citation.] But conduct by a prosecutor that does not render a trial fundamentally unfair may nonetheless constitute misconduct under state law if it involves the use of deceptive or reprehensible methods in an attempt to persuade the trier of fact." (*People v. Woods* (2006) 146 Cal.App.4th 106, 111.) In certain situations, the prejudicial effect of misconduct may be cured by an admonition from the trial court. (*Id.* at p. 118; *In re Brian J.* (2007) 150 Cal.App.4th 97, 123 (*Brian J.*).) This is one such situation. The prosecutor's misconduct here was not of the "fundamentally unfair" stripe. (*Woods*, at p. 111.)

The misconduct involved defendant's juvenile adjudication for an attempted carjacking in which defendant pointed a gun at the victim through the passenger window.

In cross-examining defendant, the prosecutor, after establishing that defendant had been in the California Youth Authority (CYA) for four years (for the carjacking offense), asked: "And that's because you put a gun to a man's head, a .22, correct?" This question contravened not only the trial court's request that the prosecutor first obtain a ruling before impeaching in this way, but also the court's prior ruling "that the part about the gun wouldn't be introduced." Furthermore, a little later in the cross-examination, the prosecutor referred to defendant's four-year stint in CYA as being for a carjacking rather than for an attempted carjacking. Defense counsel successfully objected to both transgressions, but unsuccessfully moved for a mistrial.

On appeal, defendant argues that although defense counsel "proposed a special instruction that would have included the inaccuracies in the [prosecutor's] question, [fn. omitted] the court instead instructed the jury pursuant to CALCRIM [No.] 222," which provides generally, as relevant, that attorneys' "questions are not evidence. Only the witnesses' answers are evidence. . . . Do not assume that something is true just because one of the attorneys asked a question that suggested it was true." Defense counsel's requested special instruction stated: "When the prosecutor began asking [] defendant a

question about his 1998 prior juvenile adjudication for attempted carjacking, her question contained an inaccurate description of the facts of that episode. The court has already instructed you to disregard this question."

Contrary to defendant's argument, the trial court, immediately after instructing with CALCRIM No. 222, added: "At one time during the cross-examination of [] defendant the People asked [] defendant a question about his 1998 juvenile adjudication that contained an inaccurate description of the event underlying the adjudication. After the question was asked I instructed you to disregard that question. You must not consider that question for any purpose."

Thus, the trial court *did* instruct in the curative fashion suggested by defendant. Through this instruction, like the instruction deemed curative in *Brian J.*, "the trial court tailored its admonition to the prosecutor's specific remarks." (*Brian J.*, *supra*, 150 Cal.App.4th at p. 123.) And like the court in *Brian J.*, "[w]e [too] conclude the trial court's admonition to the jury was sufficient to cure any prejudice from the prosecutor's misconduct." (*Ibid.*)

II. Prosecutor Withholding Evidence Implicating Juan Rayo

Defendant contends the prosecutor violated due process under *Brady v. Maryland* (1963) 373 U.S. 83 [10 L.Ed.2d 215] by failing to disclose to the defense a police report involving the arrest of Rayo on July 16, 2005, for firing a .22-caliber

handgun at another youth in a gang-based incident separate from the fair shooting. We find no due process *Brady* violation.

Under *Brady*, the prosecution violates a defendant's due process rights if it suppresses evidence favorable to the defendant that is material either to guilt or to punishment. (*Brady, supra,* 373 U.S. at p. 87 [10 L.Ed.2d at p. 218].) "'"The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."'" (*People v. Memro* (1995) 11 Cal.4th 786, 837, quoting *United States v. Bagley* (1985) 473 U.S. 667, 682 [87 L.Ed.2d 481, 494].)

Here, the record shows that while the prosecution disclosed to the defense a *summary* of the Stockton police report (No. 05-38494) regarding the July 16, 2005 Rayo incident, the prosecution may not have disclosed the *entire* report. The disclosed summary stated: "Rayo and Juan Munoz, Jr., were involved in an altercation in the 2100 block of Fremont (crime report No. 05-38494). [¶] During this argument, Munoz called Rayo a scrap [i.e., a derogatory term for Sureno]. Rayo pulled a gun out of his backpack and pointed it at Munoz. Rayo then took off running and simultaneously shot at Munoz. Rayo was later caught by Munoz and they were involved in a fistfight." The entire police report added that the incident occurred on July 16, 2005, and that Rayo's gun was a .22-caliber revolver.

(This incident, then, occurred three weeks after the fair shooting and involved at least the same type of weapon as apparently used in that shooting.)

Defendant raised the *Brady* issue in a postconviction motion for new trial. Before deciding that motion, the trial court had granted defendant's request to compare the bullet recovered from Jose P. (one of the victims of the fair shooting, and the only ballistics evidence obtained from that shooting) with the .22-caliber revolver taken from Rayo after the Rayo-Munoz shooting. This comparison disclosed that while Jose P.'s bullet was a .22-caliber slug, it was too badly damaged to compare to the gun obtained from Rayo.

Rayo, furthermore, originally had been charged jointly with defendant as to all counts and enhancements in the fair shooting incident, but defendant was tried first. Following defendant's conviction, Rayo entered a negotiated plea and was sentenced to a 17-year state prison term for that incident. Also, subsequent to defendant's conviction and Rayo's plea, Rayo, at the hearing on defendant's motion for new trial (more on this later), admitted for the first time that he had been the shooter at the fair.

The trial court denied defendant's *Brady* claim, reasoning: "Assuming without deciding that the defense did not receive the July 16, 2005 Rayo reports (or that they overlooked the reports in the discovery that was provided), the court finds that the fact Rayo was arrested with a .22[-c]aliber weapon that cannot

be tied to the [fair] shooting ballistically weeks after the shooting is not material. It is an unfortunate fact of our community that there are many, many guns on the street. Many of them are 'duce duce' or .22 caliber. In fact, defendant is depicted holding [a] semi-automatic handgun in People's Exhibit 44F. By his own admission, the weapon is .22 caliber. With no tie to the July [*sic*; actually, June] 26, 2005 fair shooting, it is not reasonably probable that the disclosure of the Rayo report would have altered the result of the trial. The confidence of the court is not undermined by this alleged failure given the totality of the circumstances. Of course, those circumstances include the fact that Rayo's photograph was identified by Hector [C.] as having been the person with defendant just prior to the shooting and the circumstance [of] both defendant and Rayo being fellow Sureno gang members. As the expert testimony disclosed in this case, it is common for gang members to hold and pass guns around."

To this, the People add in their brief on appeal that the defense at trial was that Rayo committed the fair shooting. Defendant presented the trial testimony of various witnesses that bolstered this defense through their description of the shooter's clothing, testimony additionally confirmed by Officer Drake who detained an apparently nervous Rayo immediately after the shooting upon receiving the dispatch describing the shooter's clothing. However, as the People emphasize, the jury rejected this defense and credited Hector C.'s eyewitness

identification of defendant as the shooter. We add that Hector's identification was bolstered largely by these same witnesses' descriptions that were generally in line with defendant's height and build, a frame that was significantly taller and slimmer at 5 feet 10 inches, 150 pounds than Rayo's at 5 feet 2 inches, 120 pounds. Furthermore, as Hector testified, defendant and Rayo were together just before the shooting and possibly acted in concert. And an in-field showup of Rayo as the shooter proved negative.

The People also note that, pursuant to defendant's motion for new trial (more on this in the next section of this opinion), the trial court "fully explored" the issue of whether defendant should obtain a new trial based on "newly discovered evidence" that Rayo committed the fair shootings. At the close of extensive evidentiary hearings on this motion, the trial court issued a 37-page written opinion that discussed in detail numerous significant inconsistencies between defendant's trial testimony and the new trial motion testimony that Rayo was the shooter at the fair. Based on these inconsistencies, the trial court concluded that the evidence that Rayo was the shooter was "simply not believable."

We finally note that defendant was tried pursuant to three theories of guilt: direct perpetrator; aider and abettor of perpetrator; or aider and abettor as a natural and probable consequence of a physically violent (gang) assault. (See also

§ 12022.53, subds. (c), (d), (e) [setting forth pivotal firearm enhancements].)

Based on these reasons, we conclude there is not a reasonable probability that, had the entire police report of the Rayo-Munoz shooting incident been disclosed to the defense (disclosing the additional salient facts of the date of the incident, July 16, 2005, and the gun used, a .22-caliber revolver), the result of the proceeding would have been different. (See *Memro, supra,* 11 Cal.4th at p. 837.) Furthermore, from the report summary that was indisputably disclosed to the defense, the defense already possessed the other material facts it claims were in the report: Rayo's on-the-run shooting at a Norteno, a rival gang member, using a previously concealed handgun--a fact pattern, defendant notes, which paralleled the fair shooting. Consequently, we find no due process violation under *Brady.* (*Memro*, at p. 838.)

III. Motion for New Trial Based on Newly Discovered Evidence that Rayo Committed the Shooting at the Fair

Defendant contends the trial court erroneously denied his motion for new trial based on newly discovered evidence. (§ 1181, subd. 8.) The newly discovered evidence centered on Rayo's testimony at the new trial hearing--supported largely by the additional testimony of fellow Sureno, Fernando ("Fiero") Lemus--that Rayo was the shooter at the fair.

"'"The determination of a motion for a new trial [based on newly discovered evidence] rests so completely within the

[trial] court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears."' [Citations.] '"[I]n determining whether there has been a proper exercise of discretion on such motion, each case must be judged from its own factual background."' [Citation.] [¶] In ruling on a motion for new trial based on newly discovered evidence, the trial court considers the following factors: '"1. That the evidence, and not merely its materiality, be newly discovered; 2. That the evidence be not cumulative merely; 3. *That it be such as to render a different result probable on a retrial of the cause*; 4. That the party could not with reasonable diligence have discovered and produced it at the trial; and 5. That these facts be shown by the best evidence of which the case admits."'" (*People v. Delgado* (1993) 5 Cal.4th 312, 328 (*Delgado*), italics added.)

In a thorough, 37-page statement of decision, the trial court focused on factor 3 above and denied the motion for new trial, concluding: "Defendant's defense is grounded on two evidentiary claims. Defendant asserts he was not wearing the type of shirt Hector [C.] and other eyewitnesses indicated the shooter wore. He also contended that at the time Rayo fired the gun, the defendant was getting up from the 'fishing game' area [at the fair] where he had fallen after having been attacked by some Nortenos. With remarkable consistency, Rayo and Lemus supported those evidentiary assertions. However, there were major inconsistencies concerning nearly all other material

facts. Evaluating this new evidence objectively in combination with the trial evidence, and the circumstances in which this allegedly new evidence came to light, and the relationship between defendant, Rayo, and Lemus, and others supporting defendant's factual claims, the court finds that [the] new evidence is not of sufficient probative force to render probable a different result upon retrial."

As noted in the *Delgado* decision, "'the trial court may consider the credibility as well as materiality of the evidence in its determination [of] whether introduction of the evidence in a new trial would render a different result reasonably probable.'" (*Delgado*, *supra*, 5 Cal.4th at p. 329.)

In its exhaustive statement of decision, the trial court meticulously set forth the credibility factors and the material inconsistencies that led it to deny defendant's motion for new trial.

As for the credibility factors, they included the following. Rayo came forward as the shooter only after his case had been resolved by a negotiated plea agreement and he had been sentenced. In contrast, the day after the shooting, Erika C. spoke with Rayo and he denied being involved in the shooting. Rayo, Lemus and defendant are all Surenos who had been housed together in the same common pod at the San Joaquin County Jail near in time to the new trial motion. Rayo testified on cross-examination at the new trial hearing that he had met defendant "here and there," but had not hung out with him. Rayo's wife,

however, testified at that hearing that defendant and Rayo are "really good" friends. After defendant was convicted, and while in custody himself, Rayo wrote to defendant's friend, Erika C., stating: "I know Stroller [another gang acquaintance] is locked up, . . . but which Homies are still kicking it out there? Tavas and I might go back to county just to help Payaso [defendant's gang moniker] out to see if he can get out, but mostly like he is 'because I'm going to say what happened only what I did,' so don't do anything or say[] anything, okay? Do me that favor." Around the same time and along similar lines, Rayo wrote to his wife: "I'm talking with an attorney that's going to help Payaso in his trial. And I'm going to help him, and I need you to tell my mom to give the checkered shirt to you so you can give it to the attorney." Lemus conceded at the new trial hearing that he and defendant are good friends and were housed together in the same county jail pod at the time of defendant's motion for new trial.

As for the material inconsistencies, they ran throughout the versions of what happened before, during, and after the fair shooting. For example, as to "before": Contrary to the prosecution's theory that defendant had received a phone call (just prior to going to the fair) "to do battle," defendant stated that he simply and innocently took Erika C. and some of her friends to the fair pursuant to a phone call from her. However, Erika denied at the new trial hearing that defendant gave her a ride to the fair on June 26, 2005. As to "during":

While defendant claimed that Rayo jumped the fence at the fair because Rayo had no money for admission, Rayo said he had money and jumped the fence to smuggle the gun into the fair past security. And as to "after": Rayo and defendant could not square their stories about the post-shooting events, likely because defendant's post-version that implicated Rayo was not in the police reports that codefendant Rayo had since the police had not asked defendant about that part of the evening.

Furthermore, clothing was a significant issue regarding the fair shooting. Defendant testified at trial that he wore a white jersey with the blue number "81" at the fair, and did so to hide his gang tattoos from Nortenos. But defendant had earlier told the police he had worn a blue jersey with the white number "31" (after first saying the number was "81"). In any event, the numbers 81 and 31, and the color blue, are associated with Surenos or particular subsets, and would more prominently display Sureno affiliation than would defendant's tattoos.

Finally, the trial court, as was its prerogative in ruling on a motion for new trial based on newly discovered evidence, found Hector C.'s trial testimony "convincing" and Rayo's new trial motion testimony "simply not believable." Contrary to defendant's protestations, the trial court, in doing so, did not unconstitutionally foreclose defendant from presenting a defense based on Rayo's testimony. (*Delgado*, *supra*, 5 Cal.4th at p. 329 [on a motion for new trial based on newly discovered evidence, "'*trial court may consider the credibility* as well as

materiality of the evidence in its determination [of] whether introduction of the evidence in a new trial would render a different result reasonably probable'" (italics added)].)

We conclude the trial court did not abuse its discretion in denying defendant's motion for new trial for newly discovered evidence.

Lastly, defendant contends he was denied due process by the cumulative effect of the trial errors. The only error we have found is the prosecutor's inaccurate characterization of defendant's juvenile adjudication in cross-examining defendant. The trial court cured this error through admonishment. Consequently, defendant was not denied due process through any such cumulative effect.

DISPOSITION

The judgment is affirmed.

BUTZ, J.

We concur:

BLEASE, Acting P. J.

ROBIE, J.